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Attorneys for Plaintiffs, TNW Firearms, Inc.
and Timothy S. Bero

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

TNW FIREARMS, INC., an Oregon
Corporation, and **TIMOTHY S. BERO**, an
individual,

Plaintiff,

vs.

TACTICAL MANUFACTURING, INC.,
a dissolved Oregon Corporation,

Defendant.

No. 10-cv-01245-AC

**PLAINTIFFS' RESPONSE TO SCOTT
KOLLER'S "ANSWER AND REQUEST
THAT PLAINTIFF'S MOTION FOR
DEFAULT BE DENIED, MOTION FOR
DISMISSAL, REQUEST FOR ATTORNEY
FEES"**

I. Mr. Koller's motions should be stricken, and in the alternative, denied on the merits.

On November 17, 2010, Scott Koller filed a single pleading captioned Answer and Request that Plaintiff's Motion for Default be Denied, Motion for Dismissal, Request for Attorney Fees. Docket 12. Mr. Koller owns defendant Tactical Manufacturing, Inc., but is not

himself a defendant in this case or an attorney. Accordingly, the pleadings should be stricken, or in the alternative, denied on the merits.

A. The entire pleading should be stricken.

Because it is a corporation, defendant Tactical Manufacturing, Inc., may act only through an attorney, unless otherwise permitted by law or Court order. LR 83-9(b). As Mr. Koller is not an attorney, he may not act or plead on behalf of Tactical Manufacturing. Accordingly, the November 17 pleading should be stricken as in violation of F.R.C.P. 11 and LR 83-9(b).

B. The “answer and request that plaintiff’s motion for default be denied” should be denied.

On November 9, 2010, plaintiffs’ counsel emailed Mr. Koller: “This is notice that if by 5 pm on this Friday, November 12, 2010, you have not (1) answered or otherwise responded to the complaint in this case, TNW Firearms, Inc. v. Tactical Manufacturing, Inc., CV 10-1245 AC (D. Or.), or (2) accepted the offer set out below, we will ask the clerk to enter a notice of default.” See Mansfield Decl. ISO Request for Default, Docket 11.

Mr. Koller filed an improper “Motion to Appoint Of Counsel” on November 8, 2010, but no attorney appearing on behalf of defendant Tactical Manufacturing filed an answer or pleading “otherwise defend[ing]” against the complaint, *e.g.*, a Rule 12 motion. Accordingly, plaintiffs filed a request for default on November 15, 2010, along with a Declaration of Johnathan E. Mansfield setting out the facts providing for a default order. Dockets 10, 11. Pursuant to F.R.C.P. 55(a), because defendant’s failure to plead or otherwise defend was shown by a declaration, “the clerk must enter the party’s default.” Plaintiffs’ Request for Default was properly taken.

C. The “motion for dismissal” should be denied.

Even construing the November 17 pleading most favorably to Mr. Koller, and even assuming that it was permissibly filed by Mr. Koller, the pleading does not make even a *prima facie* showing that the complaint should be dismissed. At best, the November 17 pleading

suggests an affirmative defense of invalidity, though it is clearly deficient under any standard. Such a defense, which necessarily relies on contested facts, is not properly adjudicated on the pleadings, in a motion to dismiss under F.R.C.P. 12(b)(6) or otherwise.

D. The “request for attorney fees” should be denied.

The November 17 pleading asks for “any and all attorney fees related to this case,” but gives no legal basis for any award. This request should be denied.

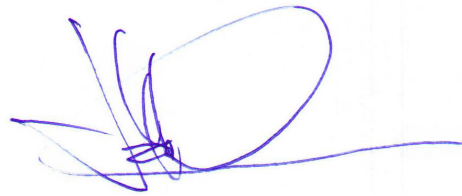
II. Conclusion

Plaintiffs respectfully request that this Court strike Mr. Koller’s Answer and Request that Plaintiff’s Motion for Default be Denied, Motion for Dismissal, Request for Attorney Fees, or in the alternative, that any motions contained therein be denied.

Dated this 22nd day of November, 2010.

Respectfully submitted,

SCHWABE, WILLIAMSON & WYATT, P.C.



By:

Johnathan E. Mansfield, OSB #055390
Telephone 503.222.9981
Of Attorneys for Plaintiffs

Trial Attorney: Johnathan E. Mansfield

CERTIFICATE OF SERVICE

I am a resident of the State of Oregon, I am over the age of 18 years, and I am not a party to this lawsuit. My business address is 1211 SW Fifth Avenue, Suite 1900, Portland, Oregon, 97204. On the date listed below, I served the following document titled: PLAINTIFFS' RESPONSE TO SCOTT KOLLER'S "ANSWER AND REQUEST THAT PLAINTIFF'S MOTION FOR DEFAULT BE DENIED, MOTION FOR DISMISSAL, REQUEST FOR ATTORNEY FEES," in the manner indicated:

☒ by placing the document listed above in a sealed envelope to the address set forth below with first class postage thereon fully prepaid and deposited said envelope with the United States Postal Service on the same date set out below.

Tactical Manufacturing, Inc.
c/o Scott W. Koller
57319 Hazen Rd.
Warren, OR 97053

Defendant

VIA U.S. MAIL

I declare under penalty of perjury that the above is true and correct.

Executed November 22, 2010, at Portland, Oregon.

s/ Johnathan E. Mansfield
Johnathan E. Mansfield